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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FINLEY COAL COMPANY AND CHARLES FINLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 493 F. 2d 285. The memorandum opinion of the district court (App. D, *infra*), is reported at 345 F. Supp. 62. The district court's supplemental memorandum opinion (App. E, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on March 13, 1974. A timely petition for rehearing and suggestion for rehearing

en banc was denied on August 6, 1974 (App. C, *infra*). By an order dated August 29, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including October 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the coal dust regulations adopted by the Secretary of the Interior under the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, *et seq.*, are invalid, because the Secretary followed the procedures required for interpretive regulations under 30 U.S.C. 957, and not the more elaborate procedures required for improved standards under 30 U.S.C. 811.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. Section 304(a) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 774, 30 U.S.C. 864(a), provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

2. 30 C.F.R. 75.400–1, provides:

> (a) The term "coal dust" means particles of coal that can pass a No. 20 sieve.
>
> (b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.
>
> (c) The term "loose coal" means coal fragments larger in size than coal dust.

3. 30 C.F.R. 75.400-2, provides:

> A program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained. Such program shall be available to the Secretary or authorized representative.

4. Section 508 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 803, 30 U.S.C. 957, provides:

> The Secretary, the Secretary of Health, Education, and Welfare, and the Panel [1] are authorized to issue such regulations as each deems appropriate to carry out any provision of this chapter.

5. Section 101 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 745, 30 U.S.C. 811, provides in pertinent part:

> (a) * * * The Secretary shall, in accordance with the procedures set forth in this section, develop, promulgate, and revise, as may be appropriate, improved mandatory safety standards for the protection of life and the prevention of injuries in a coal mine, and shall, in accordance with the procedures set forth in this section, promulgate the mandatory health standards transmitted to him by the Secretary of Health, Education, and Welfare.
>
> * * * * *
>
> (c) * * * In the development and revision of mandatory safety standards, the Secretary shall consult with the Secretary of Health, Educa-

[1] The "Panel" refers to the Interim Compliance Panel established by 30 U.S.C. 804.

tion, and Welfare, the Secretary of Labor, and with other interested Federal agencies, appropriate representatives of State agencies, appropriate representatives of the coal mine operators and miners, other interested persons and organizations, and such advisory committees as he may appoint. Such development and revision of mandatory safety standards shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of safety protection for miners, other considerations shall be the latest available scientific data in the field, the technical feasibility of the standards, and experience gained under this and other safety statutes.

* * * * *

(j) * * * All interpretations, regulations, and instructions of the Secretary or the Director of the Bureau of Mines, in effect on December 30, 1969 and not inconsistent with any provision of this chapter, shall be published in the Federal Register and shall continue in effect until modified or superseded in accordance with the provisions of this chapter.

6. Section 301 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 765, 30 U.S.C. 861, provides in pertinent part:

* * * * *

(d) * * * In any case where the provisions of sections 862 and 878, inclusive, of this title provide that certain actions, conditions, or requirements shall be carried out as prescribed by the Secretary, or the Secretary of Health, Education, and Welfare, as appropriate, the provisions of

section 553 of Title 5 shall apply unless either Secretary otherwise provides. Before granting any exception to a mandatory safety standard as authorized by this subchapter, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected coal mine.

[7]

STATEMENT

Respondents, Finley Coal Company and Charles Finley, operated two coal mines in Hyden, Leslie County, Kentucky. On December 30, 1970, there was an explosion in the interconnected underground mines which resulted in the death of 38 of the 39 miners then underground. As a result of the explosion and the subsequent investigation by the Department of Interior, a federal grand jury on June 23, 1971 returned a 24-count indictment against respondents charging each with various violations of the safety standards contained in Subchapter III—Interim Mandatory Safety Standards for Underground Coal Mines, 30 U.S.C. 861–878, and the implementive regulations for each standard.[2]

[2] The indictment, a copy of which we are lodging with the Clerk, was issued pursuant to the criminal provisions of 30 U.S.C. 819 (b) and (c). On February 23, 1971, the Bureau of Mines had issued a proposed Order of Civil Assessment of Civil Penalties to respondent Finley Coal Company in the amount of $53,600. Finley protested the Order and upon review it was modified upward to $53,800. The amended order was protested and no payment has been made in the civil penalty proceeding. The civil assessment procedures of the Act are being contested in a separate action *National Independent Coal Operators, Inc.* v. *Morton*, No. 73–2066 (pending on petition for a writ of certiorari).

By pre-trial motion, respondents sought all documentation of consultations held by the Secretary (pursuant to 30 U.S.C. 811(d)) before issuing the regulations in question. Petitioner replied that no such consultations were held since the regulations in question were promulgated pursuant to 30 U.S.C. 861 and 957 as implementing and interpretative regulations designed to carry out the interim safety standards in 30 U.S.C. 861–878.[3] Upon this disclosure respondents filed motions alleging that the dual civil and criminal proceedings violated their Fifth Amendment right against double-jeopardy[4] and that the indictments should also be dismissed because the Secretary exceeded his authority in promulgating the regulations.

Following a hearing on respondents' motions, the district court held that where the particular interim statutory standard does not specifically authorize implementing regulations, the regulations promulgated by the Secretary were necessarily "improved mandatory safety standards" and invalid because the Secretary did not engage in the consultations with industry and government required by 30 U.S.C. 811(c) for new standards (App. D, *infra*, pp. 25A–27A). The court declined to dismiss the indictment, reasoning that "[t]he absence of augmenting standards, while affecting the nature and perhaps the difficulty of proof [on numerous counts], cannot affect the maintenance of the pro-

[3] In fact there had been considerable consultation with industry but the consultations within government required for new standards by 30 U.S.C. 811(d) had not been held.

[4] Respondents' double-jeopardy argument was rejected by both the district court and court of appeals (App. A, *infra*; App. D, *infra*, pp. 20A–23A).

ceeding"-(*id.* at 27A). However, in order to provide petitioner with an appealable order the court dismissed one count of the indictment, Count VII,[5] "on the ground of defective rule making and apparent inability of the Government to make a prima facie case against the defendants on the statutory language alone" (*id.* at 28A).

Since the court's opinion did not consider whether the regulations might be sustained under the Act's general rule-making provision, 30 U.S.C. 957 (*supra*, p. 3) petitioner filed a motion for reconsideration. The district court in its unreported Supplemental Memorandum (App. E, *infra*, p. 31A) held, "The Secretary chose to exercise the authority of 30 U.S.C. 961(d) alone and not to incorporate the general administrative rule making authority of 30 U.S.C. 957." On this basis it concluded that the regulations were invalid except where the section implemented specifically called for action by the Secretary.

2. The court of appeals affirmed. It held that in promulgating the regulations of November 20, 1970, which were codified in 30 C.F.R. Part 75, the Secretary revised the statutory safety standards contained in the Act. Therefore, in the absence of authority in the statutory standard itself directing the Secretary to establish additional implementing

[5] Each count of the indictment alleged violations of both the statutory interim mandatory health or safety standards and the corresponding implementing regulations promulgated by the Secretary. Count VII, dismissed by the court, alleged violations of both 30 U.S.C. 861(a) and 30 C.F.R. 75.400.

regulations pursuant to 30 U.S.C. 861(d), the special rule-making procedures in 30 U.S.C. 811, had to be followed. The court also held that 30 C.F.R. 75.400–1, which defines loose coal and coal dust, has the effect of changing the statutory standard established in 30 U.S.C. 864(a), which requires that loose coal and coal dust be cleaned up and not allowed to accumulate. The court reasoned that because the lower court determined that a prima facie case could be made on the basis of a statutory standard alone, the regulations necessarily altered the legal relations of the parties and was thus a new standard; and that 30 C.F.R. 75.400–2 similarly changed the statutory standard of 30 U.S.C. 864(a), by imposing the establishment of a regular cleanup program in addition to the coal dust limitations of the statutory standard (App. A, *infra*, pp. 1A–42A).

One judge, in a separate concurring opinion, found that the purpose of the regulations issued in November, 1970 was not to amend and revise the statutory standards (as the majority had found), but only to amend and revise the regulations published on March 28, 1970. Nonetheless, he found that 30 C.F.R. 75.400–2 (the cleanup requirements) substantively altered the statutory standard; and, therefore, the Secretary was required to conform to 30 U.S.C. 811(e), in promulgating this standard. In addition, he noted that he would not find that the definitions contained in 30 C.F.R. 75.400–1 altered the mandatory standards but for petitioner's concession that both 30 C.F.R.

75.400–1 and 30 C.F.R. 75.400–2 were required in order to make a prima facie case against defendants. He applied the principle of strict constuction in criminal cases, and held that the definitions contained in 30 C.F.R. 75.400–1 must be viewed as imposing additional burdens and, therefore, could not be considered interpretative (App. A, *infra*, pp. 12A–15A).

REASONS FOR GRANTING THE WRIT

1. In adopting the Federal Coal Mine Health and Safety Act of 1969 Congress declared that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner" and that, therefore, the purpose of the act was "to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners." 30 U.S.C. 801(a), (g)(1). Congress consequently enacted, as part of the Act, interim mandatory health and safety standards to take effect immediately [6] but also authorized and directed the Secretary to undertake scientific studies and, after consultation with labor, industry and other branches of government, to develop and adopt improved standards. 30 U.S.C. 811(a), 30

[6] The Interim Mandatory Safety Standards for Underground Coal Mines, Subchapter III of the Act, are codified at 30 U.S.C. 861–878. The Interim Mandatory Health Standards are set forth as Subchapter II of the Act, 30 U.S.C. 841–846.

Congress, however, recognized that the interim statutory standards would require implementing regulations to be adopted by the Secretary. Accordingly, in addition to the elaborate procedure set up for adoption of new substantive standards (30 U.S.C. 811(a)), the Act provides (30 U.S.C. 861(d)) that where sections specifically call for determinations by the Secretary those determinations shall be made in accordance with 5 U.S.C. 553, the public rule-making provisions of the Administrative Procedure Act. In addition, the Secretary is specifically given authority "* * * to issue such regulations as [he] deems appropriate to carry out *any* provision of this chapter" (30 U.S.C. 957; emphasis added).

The court of appeals' decision in effect invalidates this careful grant of regulatory authority, and impedes enforcement of the Act by striking down all implementing regulations (30 C.F.R. Part 75) which were not based on a grant of rule-making authority in a particular statutory safety standard. The regulations affected in the instant case are those interpreting 30 U.S.C. 864(a), 864(d) and 866(d). Therefore, in addition to the dismissal of Count VII, petitioner will not be able to employ Part 75 regulations in attempting to prove Counts VIII, IX, X, XI, XX, XXI, XXII, XXIII, and XXIV, all of which involved one of the above statutory provisions. If allowed to stand, the court's decision could affect as many as 166 sections of the Department of Interior's Part 75 regulations. Not only will this have a severe impact on the administration of the Act in criminal cases, but it will also have a serious adverse effect on many

civil penalty enforcement proceedings now pending before the Secretary. Even if the court's decision were limited to the facts of this case, the decision renders the coal dust provisions, crucial to mine safety, ineffective and renders unpunishable hundreds, if not thousands, of past violations. The importance of immediate and effective enforcement of the Act to prevent loss of life through mine disasters, and the large number of pending proceedings, make review by this Court appropriate.

2. The court of appeals was incorrect in interpreting the regulations in question as being "improved mandatory safety standards" within the special meaning of 30 U.S.C. 811(a), and thus as requiring the special consultation procedures of that section.

That these are interpretive or implementive regulations—and not the "improved standards" contemplated by 30 U.S.C. 811(a)—seems clear in reading the regulations with the section of the statute to which they apply. The statute section, 30 U.S.C. 864(a) (see p. 2, supra), requires that "Coal dust, including float coal dust * * * be cleaned up and not be permitted to accumulate * * *". The regulations define "coal dust", "float coal dust", and then require that a clean up program be established and maintained. The regulations in no way change, amend or revise the substantive provisions of the mandatory safety standards. To the contrary, they are interpretive of the respective statutory standards, and as such were validly promulgated under the general rulemaking authority granted in 30 U.S.C. 957.

That the definitions are no more than that is indicated by their lack of novelty. For example, the definition of coal dust used in 30 C.F.R. 75.400–1 was first used in Bureau of Mines Research Bulletin No. 20 issued in 1911 and has been reaffirmed continuously (see Bureau of Mine Information Circular 8801 issued 1950). The fact that the definitions make the statutory standard more definite and clear is not to revise but, rather, to clarify, the statutory standard.

The administrative history points in the same direction. On March 30, 1970, the interim statutory standards were to become effective. To meet that deadline, the Secretary had to issue regulations to implement the Act by that date. Accordingly, on March 28, 1970 (35 Fed. Reg. 5221–5254), the Secretary promulgated Part 75 of 30 C.F.R., consisting of a verbatim quotation of each statutory standard, followed by interpretive and implementing regulations (see *supra*, pp. 2–3). The Secretary cited 30 U.S.C. 811(j) and 30 U.S.C. 957 as authority for this action.[7] On August 14, 1970 (35 Fed. Reg. 12911–12951), the Secretary amended some of his interpretive standards and proposed additional ones. On November 20, 1970 (35 Fed. Reg. 17890–17929), the Secretary republished Part 75 with the amendments and additions. The republished Part 75 of the regulations cited 30 U.S.C. 861 and 30 U.S.C. 957 of the Act as authority. However, the preface or preamble to the regulation only listed 30 U.S.C.

[7] The reference to Section 811 was not to the provisions on improved standards, but to Section (j) on making old regulations applicable until new ones are promulgated (see p. 4, *supra*).

861 as authority. A fair reading of this history in our view shows that the Secretary did not follow the provisions of 30 U.S.C. 811(c) because the amendments were interpretive and the extended procedures of that section designed for a major re-studying of coal mine safety would have been inappropriate and would have delayed enforcement contrary to the intent of Congress.

That it is inappropriate to apply 30 U.S.C. 811(c) procedures to regulations such as those at issue here, becomes even clearer on close scrutiny of 811(c). Under 811(c), the "development and revision" of improved "mandatory safety standards" is to be based upon "research, demonstrations, experiments" and other information. Consideration "shall" be given to "the latest available scientific data in the field, the technical feasibility of the standards, and *experience gained under* [*the act*]" (Emphasis supplied.) The clear and unavoidable thrust of the section is its applicability only to long term improvement in mine safety based on new research and technology. It would seem beyond discussion that Congress did not expect the Secretary to produce new knowledge in this area or undertake an 811(c) study prior to or virtually contemporaneously with the effective date of the act[8].

[8] It should be noted that the Secretary did promulgate the implementing regulations in question in the manner required by 30 U.S.C. 861 and 957. Section 861 gave the Secretary discretionary authority to determine whether to follow 5 U.S.C. 553 in the promulgation of regulations concerning provisions of 30 U.S.C. 862 to 878 in which he was required to perform certain actions. The implementing regulations promulgated pursuant to

The basic vice of the decision below thus lies in its failure to reconcile the three provisions authorizing the Secretary to promulgate regulations. Nothing in 30 U.S.C. 811(a) nor in its legislative history supports the conclusion that it is to be read to the exclusion of 30 U.S.C. 957.[2] The two sections of the same Act are simultaneous expressions of legislative intent and are to be construed so as to give effect to both. *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326; *United States* v. *American Trucking Ass'ns., Inc.*, 310 U.S. 534. The clear meaning of 30 U.S.C. 957 is to authorize immediate implementive and interpretive regulations without the procedures, relevant to a different purpose, of 30 U.S.C. 811(e).

In failing to recognize this the courts below in striking down present regulations have dealt a serious blow to the enforcement of this important Safety Act. They have also impeded the ability of the Secretary to make needful implementive regulations, without procedures designed for long range changes, and therefore tolerant of delays inappropriate for day-by-day enforcement of safety measures.

Section 957 of the Act, fall within an exception to the general rule-making requirements of 5 U.S.C. 553 (d)(1) and (d)(2). Nevertheless, the Secretary did give notice of proposed rule-making published in the Federal Register on August 14, 1970 (35 Fed. Reg. 12941). This notice of publication is recited in the preface to the interpretive regulations in question.

[2] See S. Rep. No. 411, 91st Cong., 1st Sess.; H. Rep. No. 563, 91st Cong., 1st Sess.; H. Conf. Rep. No. 761, 91st Cong., 1st Sess.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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OCTOBER 1974.

559-910—74——3

APPENDIX A

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA

v.

FINLEY COAL COMPANY, A PARTNERSHIP AND CHARLES FINLEY, AN INDIVIDUAL

On Appeal From the United States District Court for the Eastern District of Kentucky

Decided and Filed March 13, 1974

Before: McCREE, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and PRATT,[1] District Judge

McCREE, Circuit Judge. This appeal requires us to determine whether the Secretary of Interior's failure to follow the formal rule-making provisions of 30 U.S.C. § 811 in promulgating regulations establishing certain mine safety standards precludes a prosecution for their violation. We hold that it does, and we affirm the order of the district court dismissing Count 7 of a pending twenty-four count indictment that charged defendants-appellees Finley Coal Company and Charles Finley with willful violations of interim mandatory safety standards established by the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, Dec. 30, 1969, 83 Stat. 742, 30 U.S.C. §§ 801 *et seq.*, and of regulations promulgated by the Secretary of Interior thereunder, 30 C.F.R., Part 75.

[1] The Honorable Philip Pratt, Judge, U.S. District Court for the Eastern District of Michigan, sitting by designation.

Finley Coal Company operated several coal mines at Hyden, Kentucky, and Charles Finley was a partner active in the company. The indictment followed an explosion in appellees' underground mines, in which thirty-eight miners died. Preliminary to trial, appellees challenged the indictment, contending that the regulations implementing the safety standards were invalid because the Secretary of Interior in promulgating them failed to follow the mandatory consultation procedures of 30 U.S.C. § 811. The United States concedes that the Secretary did not engage in consultations sufficient to satisfy Section 811(e) in establishing the challenged safety standards, but argues, nevertheless, that the regulations were properly promulgated pursuant to authority found in several other provisions of the Act, namely, 30 U.S.C. § 861(d) and 30 U.S.C. § 957. The district court upheld certain regulations that it determined were adopted under the specific authority of Section 861, but held invalid all other regulations. It does not appear that the district court considered whether the regulations it held invalid could be sustained under the general grant of administrative authority in Section 957.[2] The court held that the defective rulemaking, in itself, did not require dismissal of the indictment because it charged violations not only of

[2] The district court's decision was rendered in a memorandum opinion, filed July 7, reported at 345 F. Supp. 62, and a supplemental memorandum opinion, filed September 12, 1972. The first opinion does not consider whether the regulations might be sustained under § 957. The second opinion more specifically states:

"The Secretary chose to exercise the authority of 30 U.S.C. 861(d) alone and not to incorporate the general administrative rule making authority of 30 U.S.C. 957. The sole question is whether section 861(d) properly may be construed to bring the subject regulations within its range of authority."

the invalidated regulations but also of the standards established by Congress. The court concluded, however, that the government could not make a prima facie case under Count 7 of the indictment on the basis of the statutory standards alone and, accordingly, Count 7 was dismissed. The government apparently concedes that it could not prevail on this count without the stricken regulations.

The United States brought this appeal, pursuant to 18 U.S.C. § 3731, from dismissal of Count 7 of the indictment. The sole issue presented is whether the Secretary of Interior was required to follow the provisions of 30 U.S.C. § 811 in promulgating the regulations codified in 30 C.F.R. § 75.400.

Count 7 charged willful violations of 30 U.S.C. § 864(a) and the regulations codified at 30 C.F.R. § 75.400.[3] Section 864(a) provides:

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[3] As set forth in appellant's brief. Count 7 charged:

"COUNT VII

"The Grand Jury further charges: 1. Each allegation contained in paragraphs 1 and 2 of the Count I hereof is realleged, reaffirmed, and incorporated herein. 2. On or about June 19, 1970, the Finley Coal Company and Charles Finley did willfully fail to clean up and prevent the accumulation of coal dust, including float dust deposited on rock-dusted surfaces, loose coal, and other combustible materials in active workings of Number 15 underground coal mine, in violation of Sections 109(b) and 304(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(b) and 864(a), 30 C.F.R. 75.400."

We observe a curious sequential relationship between the date of the promulgation of the regulations cited in Count 7 of the indictment, November 20, 1970, and the date of the violations charged in that count, June 19, 1970. At oral argument, counsel advised us that on June 19, 1970 regulations were in effect with language identical to that found in the November regulations that the indictment charged were violated in the indictment. (Apparently, the earlier regulations were promulgated in March 1970 when the Act first took effect.) Of course, the statutory

> (a) Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

The pertinent regulations provided:

> *§ 75.400–1 Definitions.*
>
> (a) The term "coal dust" means particles of coal that can pass a No. 20 sieve.
>
> (b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.
>
> (c) The term "loose coal" means coal fragments larger in size than coal dust.
>
> *§ 75.400–2 Cleanup program.*
>
> A program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained. Such program shall be maintained. Such program shall be available to the Secretary or authorized representative.

We first observe the express requirement of mandatory consultation established by 30 U.S.C. § 811. The section provides in pertinent part:

> (a) The Secretary *shall,* in accordance with the procedures set forth in this section, *develop, promulgate,* and *revise,* as may be appropriate,

---

provision underlying the subject regulations. Section 864(a), which was also relied upon in Count 7, was in effect on the date of the violations charged. Appellant does not raise the question whether a prosecution and conviction relying upon the challenged November regulations, under these circumstances, would violate the constitutional prohibition against ex post facto laws. Since this contention was not made and the question was not briefed and argued, we intimate no views concerning it.

> improved mandatory safety standards for the protection of life and the prevention of injuries in a coal mine, and shall, in accordance with the procedures set forth in this section, promulgate the mandatory health standards transmitted to him by the Secretary of Health, Education, and Welfare.
>
> * * * * *
>
> (c) In the development and *revision* of mandatory safety standards, the Secretary *shall consult* with the Secretary of Health, Education, and Welfare, the Secretary of Labor, and with other interested Federal agencies, appropriate representatives of the coal mine operators and miners, other interested persons and organizations, and such advisory committees as he may appoint. Such development and revision of mandatory safety standards shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of safety protection for miners, other considerations shall be the latest available scientific data in the field, the technical feasibility of the standards, and experience gained under this and other safety statutes. (Emphasis added).

This language must be construed in light of a definitional provision of the Act, 30 U.S.C. § 802(*l*), which provides:

> For the purpose of this chapter, the term— * * * (*l*) "mandatory health or safety standard" means the interim mandatory health or safety standards established by subchapters II and III of this chapter, and the standards promulgated pursuant to subchapter I of this chapter; * * *

When Section 811(c) is read in conjunction with the definitional provision it is apparent that Section 811

(c) by its terms applies not only when the Secretary develops new mandatory standards but also when the Secretary "revises" an interim mandatory safety standard.

Appellant does not now press the argument that the regulations codified in 30 C.F.R. § 75.400 can be sustained under the authority of 30 U.S.C. § 861(d), but that contention does not appear to have been wholly abandoned on appeal. Section 861(d) provides in relevant part:

> (d) In any case where the provisions of sections 862 to 878, inclusive, of this title provide that certain actions, conditions, or requirements shall be carried out as prescribed by the Secretary, or the Secretary of Health, Education, and Welfare, as appropriate, the provisions of section 553 of Title 5 shall apply unless either Secretary otherwise provides. * * *

We agree with the district court that the regulations here at issue cannot be upheld under the authority of Section 861(d) because Section 864(a) does not provide that the Secretary may prescribe how the "certain actions, conditions, or requirements" set forth therein shall be carried out.

Appellant's primary contention on appeal is that the regulations codified at 30 C.F.R. § 75.400 are interpretative regulations properly promulgated under the general rule-making authority of 30 U.S.C. § 957 to carry out Section 864(a), and, as such, had the effect of law.[1] Section 957 provides:

---

[1] Counsel has not contended, nor does our research indicate, that the regulations challenged in this appeal could be sustained under the authority of 30 U.S.C. § 811(j), which provides:

"All interpretations, regulations, and instructions of the Secretary or the Director of the Bureau of Mines, in effect

> The Secretary, the Secretary of Health, Education, and Welfare, and the Panel are authorized to issue such regulations as each deems appropriate to carry out any provisions of this chapter.

To be sure, the legislative history indicates that Section 957 permits "administrative regulations" needed to carry out provisions of the Act. Senate Report No. 91–411, 91st Congress, 1st Session 87 (1969); H.R. Rep. No. 91–563, 91st Congress, 1st Session 618 (1969). But we have found no indication that Congress intended § 957 to apply in cases involving not only administrative implementing regulations but also modifications of mandatory health and safety standards. If the Secretary was engaged in the "development and revision of mandatory safety standards," within the meaning of § 811(e), then he should have followed the specific procedure of § 811, mandated by the legislative directive to develop and revise these standards. Since specific procedures were established, the Secretary cannot rely upon the general grant of administrative rule-making authority of § 957. *See Hellmich* v. *Hellman*, 276 U.S. 233, 237 (1928).

Our examination of the Federal Coal Mine Health and Safety Act, its legislative history, and the entire record before us, indicates that appellant did revise a mandatory safety standard within the meaning of § 811, in promulgating the regulations codified at 30 C.F.R. § 75.400. This conclusion is supported, in the first instance, by the Secretary of Interior's own characterization of his actions. The regulations published on November 20, 1970, were introduced in the following manner:

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on December 30, 1969, and not inconsistent with any provision of this chapter, shall be published in the Federal Register and shall continue in effect until modified or superseded in accordance with the provisions of this chapter."

TITLE 30—MINERAL RESOURCES

Chapter I—Bureau of Mines, Department of the Interior

Subchapter O—Coal Mine Health and Safety

PART 75—MANDATORY SAFETY STANDARDS, UNDERGROUND COAL MINES

Pursuant to the authority contained in paragraph (d) of section 301 of the Coal Mine Health and Safety Act of 1969 (Public Law 91-173), there was published in the Federal Registered (sic) for August 14, 1970 (35 F.R. 12911), a notice of proposed rulemaking setting forth proposed amendments and a new Subpart S, "Approved Books and Records," to Part 75 of Title 30, Code of Federal Regulations, regarding mandatory health and safety standards in underground coal mines.

Interested persons were afforded a period of 30 days from the date of publication of the notice in which to submit written comments, suggestions, or objections to the proposed amendments and the proposed new Subpart S. The period for submitting written comments, suggestions, or objections was subsequently extended to September 30, 1970, by a notice published in the Federal Register for September 5, 1970 (35 F.R. 14146). Approximately 21 associations, companies, and individuals submitted comments, suggestions, or objections. All were given careful consideration. A summary of the comments and an explanation of the actions taken with respect to them will be prepared by the Bureau of Mines and will be available 30 days from the date of this publication in the Office of the Deputy for Health and Safety, Room 4512, Bureau of Mines, Department of the Interior, Washington, D.C. 20240.

Some of the standards have been revised as suggested; in other instances, revisions were made in view of the comments received. Some of the suggestions could not be adopted because they were contrary to the statutory provisions. (Emphasis added.)

Part 75 of Title 30 Code of Federal Regulations, Subchapter O—Coal Mine Health and Safety—Mandatory Health and Safety Standards, Underground Coal Mines, *amended* and *revised* as set forth below is herewith promulgated and shall become effective upon publication in the Federal Register.

WALTER J. HICKEL,
Secretary of the Interior.

NOVEMBER 12, 1970.

We agree with appellees that the Secretary could not have made it any plainer that he was amending and revising the standards.[5]

It is equally clear that the regulations challenged in this appeal were intended to be amendments and revisions of statutory standards. 30 C.F.R. § 75.400–2 imposes a requirement additional to those imposed by Congress in § 864(a). The statute requires only that coal dust be cleaned up and not be permitted to accumulate. It does not require, as did the regulation, that a "regular cleanup" program be established, maintained and made available to the Secretary. In another part of the Act Congress did expressly command that some regular or periodic programs be established and made available to the Secretary to combat other safety

[5] As noted above, the United States has conceded that the consultations engaged in cannot satisfy 30 U.S.C. § 811(c) if that provision is applicable. Apparently, the consultations that were engaged in preliminary to the promulgation of the regulations were meant to satisfy the less rigorous requirements of 5 U.S.C. § 553, a section of the Administrative Procedure Act. *See* 30 U.S.C. § 861(d).

hazards addressed by the interim standards. *See, e.g.*, 30 U.S.C. § 863 (a), (f), (g) & (w). We conclude that 30 C.F.R. § 75.400-2 changed the standard in § 864(a). Also, 30 C.F.R. § 75.400-1, although cast in definitional language,[6] has the effect of changing the standards established by Congress in § 864(a) if it imposes an additional requirement. And the very fact that the district court determined that a prima facie case could not be made on the basis of § 864(a) alone, in the absence of the regulations, a determination not challenged on appeal, indicates that the regulations altered the legal relations of the parties.

We have examined *Gibson Wine Co.* v. *Snyder*, 194 F. 2d 329 (D.C. Cir. 1952), *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, (1941), *Toilet Goods Association* v. *Gardner*, 278 F. Supp. 786 (S.D.N.Y. 1968), *Toilet Goods Association* v. *Gardner*, 360 F. 2d 677 (2d Cir. 1966), *aff'd* 387 U.S. 158 (1967), relied upon by appellant in support of the contention that the challenged regulations can be upheld under § 957 as "interpretative" regulations. We agree with appellee that these cases are inapposite because none involved a criminal prosecution and none was considered in a context where Congress had established a procedure permitting the agency to revise statutory standards only after engaging in mandatory consultation procedures with interested and affected parties. It matters not whether under a different statutory scheme a general grant of rule-making authority might have supported the regulations. Here, Congress re-

[6] The label placed upon agency action by administrators is, of course, not conclusive. *See Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942); *Powell* v. *United States*, 300 U.S. 276, 284-85 (1937); *A. F. of L.* v. *Labor Board*, 308 U.S. 401, 408 (1940). *See also Pharmaceutical Manufacturers Association* v. *Finch*, 307 F. Supp. 858 (D. Del. 1970).

quired a course of consultation as a condition precedent to any substantive revision of mandatory standards, except for modifications specifically authorized under § 861(d).

Also, we reject the suggestion that we should uphold the regulations as contemporaneous constructions of the Act by the person charged with its implementation and enforcement. In doing so, we are aware that under the predecessor statute to the Act here considered, another court has concluded that the interpretation of the statute by the administrator charged with its execution is entitled to great weight. *St. Mary's Sewer Pipe Co.* v. *Director of United States Bureau of Mines*, 262 F. 2d 378 (3rd Cir. 1959). And we suggest no departure from this principle in the ordinary case involving a prior administrative construction, typically in an adversary context, of a substantive provision of a remedial statute. But whatever applicability this canon may have in a case where the agency's rule-making authority is conceded and only its interpretation of a rule is involved, here the very power of the agency to promulgate the challenged regulation is assailed. Accordingly, we conclude that an administrative officer's interpretation of an Act of Congress to permit him to exercise broad power to flesh-out a statute by revising interim statutory standards should be tested with less indulgence. This is particularly true when the interpretation permits promulgation of regulations and their willful violation can result in criminal prosecution. In this instance, we hold that the procedures established by Congress must be strictly observed.

Here, Congress granted the Secretary broad power to revise and even develop new substantive standards to promote the safety of coal miners. However, Congress intended that this authority could be exercised

only after compliance with a detailed course of consultation designed to ensure participation in the decision-making process of interested and affected parties.

We hold that the Secretary was obligated to follow, but did not follow, the provisions of § 811(e) in promulgating the regulations codified at 30 C.F.R. § 75.400.[7] Administrative rule-making in disregard of procedural requirements is ultra vires and, we hold that the challenged regulations were improperly promulgated and are invalid. *Texaco, Inc.* v. *Federal Power Commission*, 412 F. 2d 740 (3rd Cir. 1969); *Kelly* v. *United States Department of the Interior*, 339 F. Supp. 1095 (E.D. Cal. 1972); *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 887 (D.C. Cir. 1962).

The judgment is affirmed and the case remanded for further proceedings not inconsistent with this opinion.

PRATT, District Judge, concurring.

While I concur in the result reached by the majority, I disagree to some extent with the approach.

As I read the opinion, the majority determines that it was the purpose of the Secretary to amend and revise the statutory Interim Mandatory Safety Standards with the promulgation of regulations on November 20, 1970. Reliance is placed on the language contained in the promulgation notice quoted in full in the majority opinion (pp. 7–8, *supra.*) and on the nature and content of those regulations, codified at 30 C.F.R. § 75.400 *et seq.* It then concludes that all

[7] Only the regulations codified at 30 C.F.R. § 75.400 are at issue on this appeal. We are not called upon to consider, and we intimate no view concerning, the validity of any of the other regulations promulgated in November 1970 and codified in other sections of 30 C.F.R., Part 75.

such regulations are invalid because of the failure to conform to the requirements of 30 U.S.C. § 811(c).

It appears to me, however, that the purpose of the regulations issued in November, 1970 was not to amend and revise the statutory interim standards of the Act but rather that the Secretary intended to amend and revise the regulations which had been published on March 28, 1970. In March, as well as in November, 1970, the recitations of authority clearly indicate that the Secretary intended to publish for inclusion in the Code of Federal Regulations the statutory interim standards (e.g. § 75.400) and to promulgate the standards under Sections 811(j) and 861(d) and interpretative regulations under Section 957.[8] I can find no

[8] The promulgation statement of the Secretary appearing on March 28, 1970 in the Federal Register reads as follows:

"PART 75—MANDATORY SAFETY STANDARDS, UNDERGROUND COAL MINES

"Part 75—Mandatory Safety Standards, Underground Coal Mines, reading as set forth below, is added to Subchapter O of Chapter I, Title 30, Code of Federal Regulations. *This part includes mandatory safety standards for underground coal mines which are set forth in Title III of the Federal Coal Mine Health and Safety Act of 1969, other mandatory safety standards issued pursuant to that title and section 101(j) [30 U.S.C. § 811 (j)] of the act, and interpretations and supplementary regulations.* Because Title III of the Federal Coal Mine Health and Safety Act of 1969 becomes effective on March 30, 1970, it is impracticable either to give notice of proposed rulemaking on, or to delay the effective date of, any of the provisions of the part. Part 75 shall become effective on March 30, 1970.

WALTER J. HICKEL,
Secretary of the Interior.

[Emphasis supplied] 35 Fed. Reg. 5221

* * * * *

"Authority: The mandatory safety standards in this Part 75 either appear in, or are issued pursuant to, Title III of the

manifestation of intention by the Secretary to amend, revise or improve the statutory Interim Mandatory Safety Standard, nor do I find that such was the effect.

My concurrence in the result is based on the conclusion that, in the posture of this case, the *particular* regulations at issue here (§§ 75.400–1 and 75.400–2) are infirm because they substantively alter the interim standards on the subject and, perforce, their promulgation required conformance with Section 811(a)–(g).[9] Since the Secretary admittedly did not utilize Section 811, and since, in my opinion, other rulemaking grants in the Act do not permit such substantive alterations, Sections 75.400–1 and 75.400–2 are invalid.

This was not to say, however, that other regulations contained in 30 C.F.R. Part 75 would necessarily be invalid, because they might be sustainable under the other rulemaking grants in the Act. This determination could only be made after consideration of in-

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Continued

Federal Coal Mine Health and Safety Act of 1969, Public Law 91–173; other sections in this part are issued pursuant to § 101(j) and § 508 of that Act.

"NOTE.—The provisions of this part marked [statutory Provision] appear in Title III of the Federal Coal Mine Health and Safety Act of 1969." 35 Fed. Reg. at 5223.

[9] I have no difficulty determing that the "clean-up program" requirement appearing in Section 75.400–2 is "substantive" in nature and thus beyond the permissible scope of his rule-making authority under the Act. The definitions contained in Section 75.400–1 present a much closer question. On this appeal, however, the government concedes that it could not make a prima facie case against defendants in Count VII of the indictment without both regulations. On that basis, then, given the fact that we must apply the principle of strict construction in criminal matters, I conclude that these definitions also impose an additional burden on coal mine operators and therefore the regulation cannot be sustained as being merely interpretative. See *Gibson Wine Co. v. Snyder*, 194 F. 2d 329 (D.C. Cir. 1952).

dividual regulations with reference to the other appropriate rulemaking grants of the Act, i.e. §§ 811 (j), 861(d), and 957.

Thus, I am unable to concur in the majority opinion insofar as it may be read to hold that the Secretary's admitted failure to follow the provisions of Section 811(a)–(g) results in the invalidity of *all* regulations promulgated in November, 197), which are codified at 30 C.F.R. Part 75.

APPENDIX B

United States Court of Appeals for the Sixth Circuit

No. 72-2177

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

FINLEY COAL COMPANY, A PARTNERSHIP, AND CHARLES FINLEY, AN INDIVIDUAL, DEFENDANTS-APPELLEES

Before McCREE, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and PRATT, District Judge

Judgement

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the case is remanded for further proceedings.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court.

JAMES A. HIGGINS, *Clerk.*

A True Copy.
Attest:

JOHN P. HEHMAN, *Clerk.*

APPENDIX C

United States Court of Appeals for the Sixth Circuit

No. 72-2177

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

THE FINLEY COAL CO., A PARTNERSHIP, AND CHARLES FINLEY, AN INDIVIDUAL, DEFENDANTS-APPELLEES

Order

Before: McCREE, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and PRATT,[1] District Judge

Upon consideration of the petition for rehearing with the suggestion that it be heard en banc, and no judge of the court having requested a rehearing en banc, the petition to rehear has been referred to the hearing panel which is of the opinion that said petition for rehearing is without merit, accordingly, it is ordered that the petition for rehearing be, and it hereby is, denied.

Entered by order of the court.

JOHN P. HEHMAN, *Clerk.*

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[1] The Honorable Philip Pratt, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX D

In the United States District Court for the Eastern District of Kentucky, Jackson

Criminal No. 10,303

UNITED STATES OF AMERICA, PLAINTIFF

v.

FINLEY COAL COMPANY, A PARTNERSHIP, AND CHARLES FINLEY, AN INDIVIDUAL, DEFENDANTS

MEMORANDUM OPINION

The matters under consideration arise under a Motion to Dismiss all or several specific counts of a criminal indictment charging violations of the Federal Coal Mine and Safety Act of 1969, Pub. L. 91–173, Dec. 30, 1969, 83 Stat. 742, 30 U.S.C. 801.[1] The defendant Finley Coal Company is a partnership which prior to and on December 30, 1970, operated two coal mines at Hyden, Leslie County, Kentucky. The defendant Charles Finley is a partner of the defendant coal company. On December 30, 1970, there was an underground explosion in the interconnected mines; the consequences of that explosion in terms of fatalities are not material

[1] The legislative history of the Act will be found in the following documents: H.R. 91–563, H.R. 13950 (Comm. on Educ. & Labor), H.R. 91–761 (Comm. on Conf.); S.R. 91–411 (Comm. on Labor & Pub. Welf.), Congr. Rec. Vol. 115 (1969): Sept. 25, 26, 29, 30; Oct. 1, 2, 27, 28, 29; Dec. 17 House agreed to Conf. R; Dec. 18 Senate agreed to Conf. R.

to the present case.[2] The consequences of the explosion which are material to this case are charges of multiple violations of the Coal Mine and Safety Act of 1969, alleged to have occurred on that date and during the period from June 22, 1970 to January 26, 1971. On February 23, 1971, the Department of the Interior, Bureau of Mines, tendered to the defendant Finley Coal Company a proposed Order of Assessment of Civil Penalties in the amount of Fifty Three Thousand Six Hundred ($53,600.00) Dollars. The order was protested and upon modification, the sum of Fifty Three Thousand Eight Hundred ($53,800.00) Dollars was sought. The amended order has been protested. No payment has been made as a result of the civil proceedings. On June 23, 1971, a Federal indictment was returned against the defendant coal company and Charles Finley charging each, in twenty-four counts, with violations of safety standards established in Subchapter III—Interim Mandatory Safety Standards For Underground Coal Mines, 30 U.S.C. 861 through 878.

The defendants have filed two motions which for this consideration will be treated as a single Motion to Dismiss, Rule 12 F.R. Crim. Proc. Basically, two questions are raised by the Motion to Dismiss: First, that the dual civil and criminal proceedings violate the defendants' 5th Amendment rights against being twice placed in jeopardy for the same offense; Second, that the Secretary of the Interior violated the provisions of Section 811(e), 30 U.S.C. in promulgating "Part 75—Mandatory Safety Standards, Under-

[2] Thirty-eight of Thirty-nine miners underground died in the explosion. No count of the indictment makes material to this case the detail of the death of any fatally injured miner, except as it might apply to the allegation under 30 U.S.C. 877(n). Counts V and VI of the indictment.

ground Coal Mines"[3] and this violation is of sufficient magnitude to compel dismissal of the indictment. Defendants' contentions will be considered in the order stated.

I. DOUBLE JEOPARDY

Defendants seek dismissal of Counts II, IV, VI, VII, VIII, IX, X, XI, XIII, XV, XIX, XX, XXI, XXII, XXIII and XXIV alleging that to proceed on these counts would constitute double jeopardy in view of a pending civil administrative proceeding which, defendants contend, is punitive in nature. Another ground—violation of the intent of Congress in passing the legislation and the purpose announced in Section 109 of Act by the criminal and civil actions—is raised. No merit is found in the latter argument in view of the clear intent of the Congress to impose both civil and criminal sanctions to implement its findings and declaration of purpose, 30 U.S.C. 801.

Although defendants contend that both the individual and the partnership defendants are cited in the pending administrative proceeding, the face of the Proposed Order of Assessment issued February 23, 1971, shows that the assessment is limited to Finley Coal Company. Since the recovery of a civil penalty is not clearly sought against Charles Finley, individually, he will not be heard to contend that he has been subjected to the alleged double jeopardy. The question will be considered in relationship to the coal company.

It is settled that the Congress may constitutionally impose both a civil and a criminal sanction in the same Act for the same offense. *Helvering* v. *Mitchell,*

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[3] Federal Register, Vol. 35, No. 226, Friday, November 20, 1970, Part II, Department of the Interior, Bureau of Mines, Mandatory Standards, Underground Coal Mines.

303 U.S. 391 (1938); *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 391 (1956). A defendant is placed in jeopardy only in those cases where the action is "intended to authorize criminal punishment to vindicate public justice". *U.S. ex rel Marcus* v. *Hess*, 317 U.S. 537, 549 (1943). Where a statute provides an administrative civil proceeding with right of appeal to the courts for a trial de novo, 30 U.S.C. 819(a)(4), as to any civil assessment, the "[c]ivil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply". *Helvering* v. *Mitchell*, 303 U.S. 391, 402 (1938). The assertion that a civil assessment of Fifty Three Thousand Eight Hundred ($53,800.00) Dollars necessarily places the defendant coal company in a punitive circumstance, is upon consideration of some sixty individual violations over a period of seven months certainly not conclusive. The civil penalties range from a Twenty-Five ($25.00) Dollar assessment to the maximum of Ten Thousand ($10,000.00) Dollars. Whether or not the proceeding will terminate, if prosecuted through all appellate steps, in any penalty being asserted on alleged violations identical to those charged in the indictment cannot be known at this time. To say that the institution of civil proceedings per se imports any concept of jeopardy on the defendant goes far beyond any authority brought to the attention of this Court. To make the tenuous assumption that "jeopardy" may apply to a "civil" proceeding within the meaning of the 5th Amendment is one thing; to contend that it attaches at the outset of such proceeding is another. We know of no rule which warrants such construction.

To adopt defendant's argument would, in practical effect, bar every criminal prosecution under the Act. Under Section 819(a)(1), the Secretary is directed by the mandatory word, "shall", to impose a civil penalty on any operator who violates a mandatory health or safety standard. Even though the civil penalty sought against the defendant is a substantial amount, the number of alleged violations required repeated inspections of defendant's mines and a major investigation following the explosion of December 30, 1970.[1] The amount in controversy does not require a finding that the asserted civil penalties in this case are other than remedial.

Logically, Congress does not expose a defendant twice to jeopardy by establishing comprehensive penalties which may be imposed in separate proceedings instead of a single action where the statute sets forth clear standards regulating the imposition of one or more of such comprehensive penalties. (See the concurring opinion of Mr. Justice Frankfurter, *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537, 555 (1943)). The threat of a civil assessment and a criminal penalty against the Finley Coal Company under the Coal Mine Health and Safety Act of 1969 does not constitute double jeopardy within the meaning of the 5th Amendment. Clearly, the Congress did, in fact, in the Act establish comprehensive penalties to be imposed under stated conditions, some of which are civil and remedial

[1] The official report alone is a document of some 98 pages reflecting extensive investigation, laboratory analyses and engineering. One may not well argue that the asserted imposition of Fifty Three Thousand Eight Hundred ($53,800.00) Dollars in civil penalties was so excessive in relation to the government's cost in monitoring this defendant's mining operations as to necessitate a finding of any punitive aspect to the civil proceeding.

in nature and which are to be applied under elaborate civil procedures and others criminal in nature to be sought only against wilful violators of a mandatory health or safety standard. 30 U.S.C. 819. That all sanctions imposed by the Act—civil and criminal—seek to insure compliance with the mandatory health and safety standards certainly does not suggest any impropriety.

II. RULEMAKING

The matter in contention is simply stated. The defendants insist that the Secretary of the Interior in promulgating standards, Part 75—Mandatory Safety Standards, Underground Coal Mines, was obliged to follow the procedure of 30 U.S.C. 811(e). The United States contends that the Secretary properly proceeded under 30 U.S.C. 861(d). There is no question that the Secretary did proceed under and "[p]ursuant to the authority of paragraph (d) of Section 201 of the Coal Mine Health Safety Act of 1969".* Section 201 of the Act is codified at 30 U.S.C. 861.

At issue is whether the Secretary was under duty to consult with specifically named classes of interested persons as a condition to ruling making in this area. The significant language of 30 U.S.C. 811(e) is: "[i]n the development and revision of mandatory safety standards, the Secretary shall consult with * * * appropriate representatives of the coal mine operators and miners * * *." Under the section relied on by the Secretary, the statutory direction is expressed in the following language, 30 U.S.C. 861(d): "[i]n any case where the provisions of Sections 862 to 878, inclusive, of this title provide that certain actions, conditions, or requirements shall be carried out as prescribed by

* Federal Register, Vol. 35, No. 226, P. 17890, Nov. 30, 1970.

the Secretary * * * the provisions of section 553 of Title 5 shall apply * * * *".

The resolution of the issue depends upon what the Secretary did—whether he engaged in rule making, 811(c), or discharged a directive contained in Sections 862 through 878—and his announcement, on its face, seems perfectly candid:[6]

> Part 75 of Title 30, Code of Federal Regulations, Subchapter 0—Coal Mine Health and Safety—Mandatory Health and Safety Standards, *amended and revised as set forth below* is herewith promulgated. (Emphasis added.)

The question is not whether the Secretary had the authority to amend and revise the Mandatory Health and Safety Standards, which he clearly does, but whether he discharged that authority within the conditions specified by the Congress.

The authority to engage in general rule making is granted the Secretary in Section 811(a), 30 U.S.C.:

> The Secretary shall, in accordance with the procedures set forth in this section, develop, promulgate, revise, as may be appropriate, improved mandatory safety standards for the protection of life and prevention of injuries in a coal mine, and shall, in accordance with the procedures set forth in this section, promulgate the mandatory health standards transmitted to him by the Secretary of Health, Education, and Welfare.

The authority to act on the interim mandatory safety standards which are the subject of Subchapter III of the legislation, Sections 862 through 878, is granted to the Secretary in Section 861(a), 30 U.S.C.:

> The provisions of Sections 862 through 878 of this title shall be interim mandatory safety standards applicable to all underground coal

[6] Id.

> mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of Section 811 of this title * * *.

The language of Section 811(c) requires consultation with specifically named classes within or materially concerned about the coal industry in "the development and revision of mandatory safety standards". The Secretary has proceeded to amend and revise the mandatory standards without such consultation. The argument has been considered that the Secretary did not, in fact, engage in the "development and revision of mandatory safety standards" notwithstanding the use of the words "amended and revised" in this promulgation directive. The effect of the standards issued by the Secretary cannot be classed as merely explanatory of the various sections of the Act since these regulations impose definite standards, the violations of which would make the offender subject to civil or possible criminal penalty, and where the language of the standards is by way of definition, the definitions stated determine the point at which a possible offense would be established in fact. It would not be necessary for the Secretary's actions to alter or amend the language of the interim safety standards announced by the Congress in order for Section 811(c) to apply. It is in the very area of implementing the interim safety standards contained in the Act that Congress directed consultation. The failure to consult defeats the intent of the Congress in the rule making area: securing the advise and cooperation of the entire coal industry and appropriate Federal and State governmental agencies in the setting of standards for the "protection of life and prevention of injuries in a coal mine". The degree of concern expressed by the legislation as to the requirement of

consultation is evidenced by use of the mandatory verb "shall" and neither this Court nor the Secretary can avoid the consequences of such directive.

To bring the amended and revised standards within the scope of Section 861(d) authority—and thereby sustain the action of the Secretary—it is necessary to determine that the issuance of the standards constitutes the discharge of some "certain actions, conditions, or requirements" to be carried out as prescribed by the Secretary in Sections 862 through 878. These sections simply do not support a logical construction justifying general rule making in the face of Section 811(a), (b) and (c) in the area of safety standards. No rule of construction has been presented authorizing the Court to ignore the clear language of the Statute.

Nine interim mandatory safety standards are cited in the pending indictment. In four of those standards the Secretary is given specific authority; in five the Secretary is not given specific authority. In Sections 864(a), 864(d), 866(d), 873(a) and 873(g) the language is silent as to specific authority delegated to the Secretary. In Section 864(b) the Secretary is given authority to approve "or no less effective methods" to accomplish the object of the Section. In Section 873(c), "[t]he Secretary may, under such safeguards as he may prescribe, permit the firing of more than twenty shots and the use of nonpermissible explosives in sinking shafts and slopes from the surface rock". In Sections 877(c) and (n) the Secretary is given authority to approve, in the former, the plan to keep smoking materials and the like from the underground area; and, in the latter, to approve a self-rescue device which shall be made available to each miner "adequate to protect such miner for one hour or longer". Considering the statutory definitions contained in 30

U.S.C. 878, which are by construction a part of the sections reviewed, the legislative plan of giving specific direction and authority to the Secretary is repeated.

Where the regulations or standards promulgated by the Secretary are in response to authority granted in Sections 862 through 878, the regulations are proper and will apply in the trial of this case. But where the regulations published on November 20, 1970 by the Secretary do not reflect the exercise of authority granted in the provisions of Sections 862 through 878, we hold the authority for issuing such standards lies in Section 811 and the conditions imposed by Section 811(c) are applicable. Since no argument is made that the Secretary purported to act under Section 811, we hold that all non-conforming regulations applicable to the nine interim mandatory safety standards cited in the indictment are invalid and shall not apply in the trial of this case. No other regulations promulgated by the Secretary are before the Court.

The holding of defective rule making, however, does not warrant the dismissal of the indictment. The violations alleged in the indictment are cited as violations of interim mandatory safety standards established by the Congress. The absence of augmenting standards, while affecting the nature and perhaps the difficulty of proof, cannot affect the maintenance of the proceeding. However, to insure that both parties to this litigation are protected in their rights to a fair trial, the determination has been made that under the ruling herein made the United States probably cannot make a prima facie case against the defendants under Count No. VII of the indictment without the additional standards and definitions contained in 75.401 and 75.402. Since an immediate review of this Court's rul-

ing is warranted, Count No. VII of the indictment will be dismissed.

An order will be entered forthwith in conformity with this Memorandum Opinion overruling the Motion to Dismiss on the grounds of Double Jeopardy and violation of the intent and purpose of the Act; overruling the Motion to Dismiss, in part, on the grounds of defective rule making; and, sustaining the Motion to Dismiss as to Count VII of the indictment on the ground of defective rule making and apparent inability of the Government to make a prima facie case against the defendants on the statutory language alone.

This 7 day of July, 1972.

H. DAVID HERMANSDORFER, *JUDGE.*

APPENDIX E

In the United States District Court for the Eastern District of Kentucky, Jackson

Criminal No. 10,303

UNITED STATES OF AMERICA, PLAINTIFF

v.

FINLEY COAL COMPANY, A PARTNERSHIP, AND CHARLES FINLEY, AN INDIVIDUAL, DEFENDANTS

SUPPLEMENTAL MEMORANDUM OPINION

It is important to remember that this case is a criminal action seeking the imposition of felony sanctions on each count of a twenty-four (24) count indictment pending against the defendants. This Court is bound in a criminal prosecution to the rule of strict construction which applies to administrative regulations to which penal sanctions attach as well as to the statute itself. *United States* v. *Mersky,* 361 U.S. 431 (1960). Where a material question is directed to the procedural requirements for the issuance of such punitive regulations, we find the rule of strict construction is equally applicable.

The Assistant United States Attorney, Mr. Webb, has filed a Motion to Reconsider the Opinion filed July 7, 1972, as to rulings on the disputed regulations supported by an excellent Memorandum Brief. However, it is not a proper function of this Court to adopt rehabilitative measures in a criminal case on behalf of the prosecution. To do so would remove us from the

basic fact material to the question raised by the defendants. It is conceded that Plaintiff would be entitled to some relief from the conclusions expressed in the Memorandum Opinion of July 7, 1972, under the arguments in the brief were it possible to ignore the fact that the Secretary specified that he was issuing the regulations under the authority of "paragraph (d) of Section 301 of the Coal Mine Health Safety Act of 1969", which is codified at 30 U.S.C. 361(d). This Court has no authority to change the pronouncement of the Secretary or to permit it to be changed by counsel. The duty of the Court is "to see only that the result is reasonable and within the range of authority conveyed, that it has been formulated in the manner prescribed, and that the disappointed have had the opportunity provided by Congress to try to make their views prevail". *Automotive Parts & Accessories Assn. v. Boyd*, 407 F.2d 330, 343. (D.C. Cir., 1968).

The statutory scheme of the Act exhibits several grants of rulemaking authority of which three (3) were clearly available to the Secretary: 30 U.S.C. 811, 861(d) and 957 to support the issuance of regulations. The power delegated in Section 811 is limited to the on-going direction to improve the safety standards to regulate the operation of coal mines. The direction in Section 861(d) is limited to discharge of duties imposed on the Secretary by the language of the interim mandatory safety standards and does not relate to any other subject. Clarification of this conclusion may be had by consulting the Senate-House Conference Report: [1]

> 5. The Senate bill provided that, where the safety standards in this title provide that the Secretary prescribe how certain actions, conditions or requirements be carried out, the rule-

[1] *Congressional Record*, Dec. 16, 1969, H12577.

> making provisions of 5 U.S.C. 553 will apply, unless the Secretary otherwise provides. The House amendment had no comparable provision. The conference agreement adopts the Senate provisions with a modification to recognize that the Secretary of Health, Education and Welfare also needs this authority. This provision is not intended to apply when a safety mandatory standard is being proposed. In lieu of the rulemaking provisions, the Secretary could utilize the procedures of section 101. (Section 101 is codified at 30 U.S.C. 811)

The subject of Section 957 is a general grant of rulemaking authority to both Secretaries and the advisory panel.

The Secretary chose to exercise the authority of 30 U.S.C. 861(d) alone and not to incorporate the general administrative rule making authority of 30 U.S.C. 957. The sole question is whether section 861(d) properly may be construed to bring the subject regulations within its range of authority.

The obvious limitation on section 861(d) is contained in the words of the statute:

> (d) In any case where the provisions of sections 862 to 878, inclusive, of this title provide that certain actions, conditions, or requirements shall be carried out as prescribed by the Secretary, or the Secretary of Health, Education, and Welfare, as appropriate, the provisions of section 553 of Title 5 shall apply unless either Secretary otherwise provides. Before granting any exception to a mandatory safety standard as authorized by this subchapter, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected coal mine.

The statement of the Conference Report does not support an expansive construction of the language; rather, even within the scope of applicability of the provision if the "certain actions, conditions or requirements" involve the proposal of a safety standard, the provisions of the section are not intended to apply to such safety standard.

The provisions of 30 U.S.C. 861(d) do not apply outside the specific statutory safety standards containing directions to the Secretary. Therefore, this section is not authority for general rule making as might be exercised under the Administrative Procedures Act, 5 U.S.C. 553 (or 30 U.S.C. 957 which by construction would incorporate implementing procedures no less rigid than 5 U.S.C. 553). Section 957 cannot be impliedly incorporated into 30 U.S.C. 861(d) in a criminal prosecution under the rule of strict construction.

We have been persuaded that an examination of the entire legislative history is necessary to a consideration of this question.[2] The sense of the legislative history makes clear that the words "standard" and "rulemaking" are used as words of art. "Standard" is used in the sense of substantive matters. "Rulemaking" is employed in the sense of administrative housekeeping and procedural details. Under the rule of strict construction and in keeping with what we believe to be the sense of the Congress, we determine that no regulation to be employed as a part

[2] Gwendolyn B. Fosson, *Legislative History: Research for the Interpretation of Laws*. The University of Virginia Press, Charlottesville, Virginia, 1972. The full legislative history is cited in footnote 1 of the Memorandum Opinion filed herein on July 7, 1972.

of the law to which criminal penalties attach can be deemed other than a regulation involving a "standard". In this case, therefore, we conclude that the distinction urged by plaintiff between "interpretative" and "legislative" regulations—although recognized generally in administrative law—should not be applied to the construction of this law since all disputed regulations are cited in the indictment as authority, together with statutory provisions, for maintaining the criminal prosecution.

Accordingly, we find that we cannot grant Plaintiff the relief requested.

An Order will be entered forthwith overruling the Motion to Reconsider and setting aside the Order suspending entry of the Order directed by the Memorandum Opinion of July 7, 1972. The former Order will be entered.

The Memorandum Opinion is amended to define the scope of applicability of the determination of invalid rule making to all regulations material to this proceeding except the regulations issued under the authority of statutory directions or options contained in the language of the interim mandatory safety standards cited as authority for maintenance of this action.

This 11th day of September, 1972.

H. DAVID HERMANSDORFER, *Judge.*

A True Copy, Attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.

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